

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

75-5024

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-5024

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT
& Co., a Limited Partnership, Bankrupt,
Plaintiff-Appellant,
against

NEW YORK PRODUCE EXCHANGE, *et al.*,
Defendants-Appellees.

MEMORANDUM IN OPPOSITION TO APPELLEES'
MOTION FOR PERMISSION TO FILE AN
ADDITIONAL BRIEF.



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Attorney's has been compared by me with the original

United States Court of Appeals
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The Trustee submits this memorandum in opposition to Appellees' motion for leave to file a "Rebuttal Brief". Appellees' motion should be denied because (i) it is untimely and there are no special reasons requiring additional briefs herein; and (ii) it misconstrues the law and facts and confuses the issues already set forth in the parties' respective briefs.

I.

Asserting their summer vacation schedules as cause for their inordinate delay (Smith Aff., ¶ 3), Appellees seek permission to file this "Rebuttal Brief" seven weeks after

the Trustee submitted his Reply Brief. Since Rule 31 of the Federal Rules of Appellate Procedure allows only fourteen days for the preparation of a reply brief, it is now far too late for the dilatory Appellees to file still another brief.

Moreover, there are no special reasons warranting any further briefs in this appeal.* The parties have already submitted to this Court seven briefs, totaling over 300 pages. Five of these briefs have been submitted by Appellees. Indeed, the term "Rebuttal Brief" itself is a misnomer—it should be properly labelled an "Addendum Brief": Contrary to Appellees' contentions, the brief which they now seek to submit does not deal with any new issues; instead it simply discusses several cases which Appellees apparently overlooked in their five earlier briefs. While Appellees argue that the Trustee raises for the first time in his Reply Brief the issue of whether he stands in the shoes of the bankrupt, it was in fact the Appellees themselves in their 90-page Joint Brief who first raised this matter (Joint Brief pp. 4, 56). Indeed, in their "Addendum Brief" Appellees repeat their prior citations to the identical authority on this issue (*Compare* Joint Brief, p. 4 *with* "Addendum Brief", p. 3). What Appellees failed to do in their Joint Brief was to call the contrary authority to this Court's attention. Now that the Trustee has done so, Appellees wish to get in the last word by filing another brief. This attempt should be rejected, particularly when, as will be shown below, Appellees have misstated the law and the Trustee's argument.

Further, Appellees also could not resist, once again, commenting on the facts and objecting to use of the term "trader-regulator". Since Point II of their "Addendum Brief" adds only rhetoric, including a patronizing sugges-

* It should be noted that no special procedural reason exists for granting permission to file this "Rebuttal Brief", as it is not being offered in the context of a cross-appeal (see Appellant's Reply Brief, p. 2 fn.).

tion that the Court look closely at the record, this portion of the proffered additional brief should be stricken.*

II.

Point I of Appellees' additional brief misapprehends and confuses the issues before this Court. As a result, the proposed new brief will not assist the Court in dealing with the complex issues raised in this appeal.

First, contrary to Appellees' assertions, ("Addendum Brief", pp. 2-3), the Trustee has consistently argued that for the purposes of this case he is not subject to certain defenses assertable against Haupt. He took this position in opposing defendants' summary judgment motion (R. 177 at p. 114), but the Trial Court specifically rejected it. *Seligson v. New York Produce Exchange*, 378 F. Supp. 1076, 1085 (S.D.N.Y. 1974). Further, written exception was taken to the Trial Court's proposed charge (R. 311). Since the Court's charge was made with full knowledge of the Trustee's position, the issue has been preserved (see *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1173 (2d Cir. 1970); *Hasselbrink v. Speelman*, 246 F.2d 34, 39 (6th Cir. 1957)).

Second, Appellees' erroneously claim that the Trustee is attempting to "confuse the issue by stating in his reply brief that he 'is suing on behalf of Haupt's creditors'" ("Addendum Brief", p. 2). There is no dispute that the Trustee brought this suit to recover for injury to the property of Haupt (11 U.S.C. § 110). This suit was not, however, brought for the benefit of the Haupt partnership (an entity which has not existed for more than a decade) but rather to further the Trustee's mandate under 11 U.S.C. § 75 to marshal the assets of the estate and distribute them

* Appellees have already commented on the "trader-regulator" designation in their Joint Brief (pp. 5-8). Further, Appellees expended 42 pages of their Joint Brief presenting the facts and four separate briefs were submitted further recounting the facts as applied to each group of defendants.

for the benefit of Haupt's creditors. See, e.g., *Kokoszka v. Belford*, 417 U.S. 642, 650 (1975).

Further, and again contrary to the Appellees' insinuations, the Trustee has never contended that by reason of his status he is not subject to any defenses, or that the defense of *in pari delicto* should never be applied against a Trustee.* Rather, his contention is much more modest: Overriding policy considerations require that the doctrines of *in pari delicto* and contributory negligence should not be used to impute the conduct of Jack Stevens to the Trustee in this action to bar his suit against the trader-regulators who failed to perform their statutory duty to properly regulate the Exchange (Reply Brief, pp. 3-7).

As a general rule a Trustee *does* stand in the shoes of the bankrupt regarding defenses, and the cases cited by Appellees on page 3 of their "Addendum Brief" stand for this general rule. None of these cases, however, involved a factual situation even remotely similar to the present case. Indeed, the only cases cited either by the Trustee or the Appellees which address the unique issues before this Court are *Lank v. New York Stock Exchange*, 405 F. Supp. 1031 (S.D.N.Y. 1975) and *Collins v. PBW Stock Exchange, Inc.*, 408 F. Supp. 1344 (E.D. Pa. 1976). Defendants' effort to dismiss *Lank* with the comment "this case involves a partnership, not a corporation, and a bankruptcy trustee, not a receiver" is an exercise in sophistry.

*Similarly misleading is appellees' statement that *Woolf v. S. D. Cohn & Co.*, 515 F.2d 591 (5th Cir. 1975), rehearing *en banc* denied, 521 F.2d 225 (1975) has been reversed ("Addendum Brief", p. 4 fn [*]). *Woolf* was cited by the Trustee in the context of a discussion of the applicability of the doctrine of *in pari delicto*. This summer, the Supreme Court vacated the decision of the Fifth Circuit and remanded the case for reconsideration in light of the Supreme Court's recent decision in *TSC Industries, Inc. v. Northway, Inc.*, —U.S.—, 48 L. Ed.2d 757 (1976), a decision which dealt solely with the issue of the materiality of false or misleading statements contained in proxy statements. The Fifth Circuit decision with respect to *in pari delicto* was left undisturbed.

Equally erroneous is Appellees' argument that *Lank* and *Collins* are distinguishable because "they were brought under a different statute and did not arise, as does the present case, after a full trial had demonstrated the culpability of the party on whose behalf the plaintiff sued" ("Addendum Brief", p. 4 fn [*]). In the *Lank* opinion, unlike the instant case, the culpability of the bankrupt was assumed.* Further, the *Lank* opinion discussed the differences in the two statutes, and found that under the Commodities Exchange Act the policy considerations disallowing the defense of *in pari delicto* were even stronger than those which existed under the Securities Exchange Act. 405 F. Supp. at 1038. Indeed, the New York Stock Exchange, in its brief to this Court in *Lank v. New York Stock Exchange*, appeal docketed, No. 76-7243, May 25, 1976, distinguishes the *Seligson* opinion on this very ground:

"Unlike the [Securities] Exchange Act [the Commodity Exchange Act] imposes a specific obligation on commodities exchanges to maintain an orderly market. (7 U.S.C. §7(d)) Moreover, the legislative history evidences a concern for the welfare of those in the plaintiff's position." (Brief for Appellant at 24)

Public policy considerations, accordingly, bar Appellees' attempt to escape the consequences of their regulatory failures by asserting the doctrines of contributory negligence or *in pari delicto*.

*Contrary to the defendants' assertion, there has been no "demonstration" of Haupt's culpability since neither the court nor the jury made any finding in this regard. Indeed, as demonstrated in the Trustee's briefs herein, since the Trial Court took away from the jury the issue of Appellees' motivation, made erroneous evidentiary rulings and incorrectly instructed the jury, the jury was deprived of an opportunity to determine the relative faults of the parties.





CONCLUSION

For the foregoing reasons, Appellees' motion for permission to file their proposed "Rebuttal Brief" should be denied in all respects. In the event, however, that this Court does grant Appellees' motion, the Trustee requests that any such order be conditioned as follows: (a) that Point II of Appellees' "Rebuttal Brief" be stricken and (b) that the Trustee be granted leave to print and file the instant memorandum in opposition hereto so that the full record on this issue is before the Court on the oral argument.

Dated: New York, New York
September 14, 1976.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
HARVEY R. MILLER, as Trustee in :
Bankruptcy of IRA HAUPT & CO., a :
Limited Partnership, Bankrupt, :

AFFIDAVIT OF SERVICE

Plaintiff-Appellant, :

Docket No. 75-5024

-against- :

NEW YORK PRODUCE EXCHANGE, et. al., :

Defendants-Appellees. :

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HELEN SCHIMENTI, being duly sworn, deposes and says that she is over the age of twenty-one; that she is employed by Weil, Gotshal & Manges, the attorneys for the Plaintiff-Appellant; that on the 22nd day of September, 1976, she served two copies of the Memorandum in Opposition to Appellees' Motion on the persons hereinafter mentioned by depositing two true copies thereof securely enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States Government at 767 Fifth Avenue, New York, New York 10022, directed to the persons hereinafter named at their office and post-office address designated by them for that purpose:

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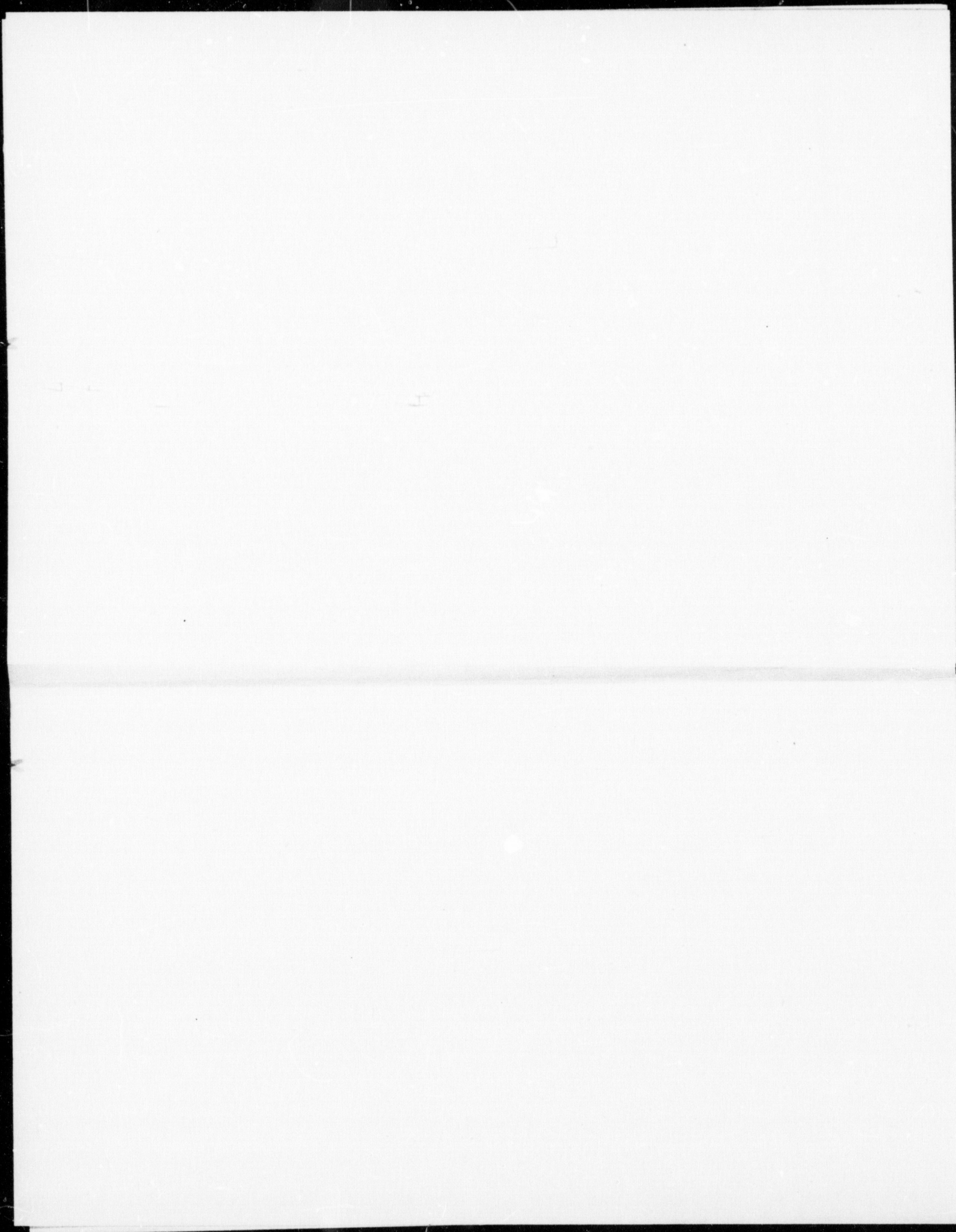
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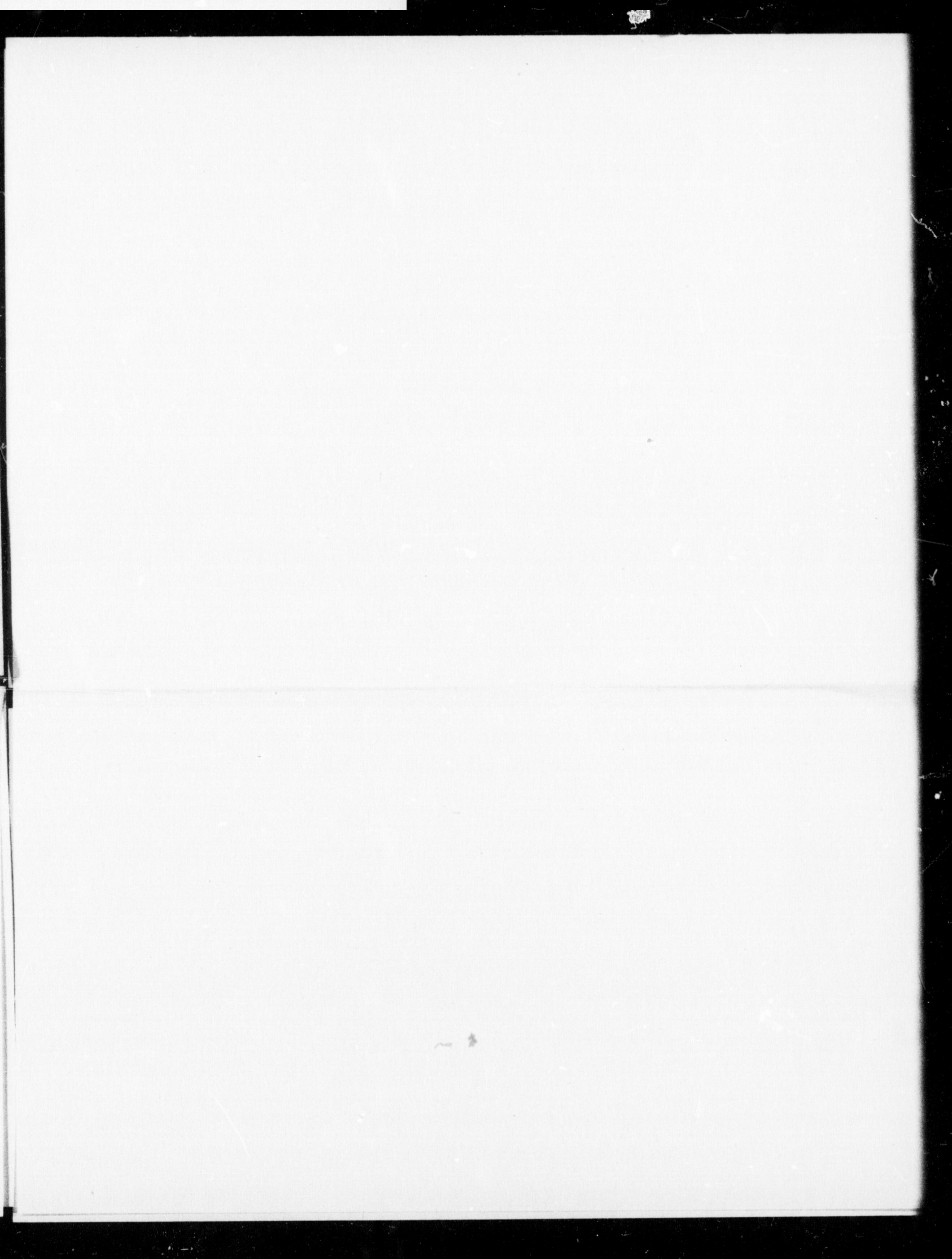
Robert F. Brodegaard

Notary Public

ROBERT F. BRODEGAARD
Notary Public, State of New York
No. 31-4625690
Qualified in New York County
Commission Expires March 30, 1973

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To:

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age and reside at

being sworn says: I am not a party to the action, am over 18 years

On

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ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ certify that the annexed
has been compared by me with the original and found to be a true and complete copy thereof.

☐ say that: I am the attorney of record, or of counsel with the attorney(s) of record, for
I have read the annexed

☐ know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on
information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon
knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated:

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF

ss:

being sworn says: I am

☐ in the action herein: I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on
information and belief, and as to those matters I believe them to be true.

☐ the of
a corporation, one of the parties to the action: I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on
information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

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(Print signer's name below signature)

Dated:

Attorney(s) for

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ENTRY

☐ that an Order of which the within is a true copy will be presented for settlement to the Hon.
NOTICE OF one of the judges of the within named Court,
SETTLEMENT at 19 , at M.
on

Dated:

WEIL, GOTSHAL & MANGES

Attorneys for

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BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022

To:

Attorney(s) for

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